Doctors Council v. HHC, 69 OCB 24 (BCB 2002) [Decision No. B-24-2002 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice Petition

-between-

DOCTORS COUNCIL, S.E.I.U., AFL-CIO,

Petitioner,

Decision No. B-24-2002
Docket No. BCB-2250-01

-and-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondent.
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DECISION AND ORDER

On November 9, 2001, Doctors Council, S.E.I.U. ("Union"), filed a verified improper practice petition alleging that the New York City Health and Hospitals Corporation ("HHC") violated § 12-306a (1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3)("NYCCBL") by unilaterally implementing productivity standards linked to discipline without first bargaining and reaching agreement with the Union. HHC argues that the Union's claims should be deferred to the grievance process, and, alternatively, that HHC is not required to bargain over the enforcement of the standards. We decline to defer this matter and find that HHC has not violated the NYCCBL. Accordingly, the petition is dismissed.

BACKGROUND

The City of New York, HHC, and the Union are parties to a collective bargaining agreement ("agreement") covering the period April 1, 1995, through March 31, 2000. The

agreement is currently in *status quo*. Article VI of the agreement is titled "Productivity and Performance," and Article VI, § 1, states:

> a. The Union recognizes the Employer's right under the New York City Collective Bargaining Law to establish and/or revise performance standards. Such standards, developed by ususal work measurement procedures, may be used to determine acceptable performance levels, to prepare work schedules and to measure the performance of each employee or group of employees. Notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees are within the scope of collective bargaining. The Employer will give the Union prior notice of the establishment and/or revision of performance standards or norms hereunder.
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> b. Employees who work at less than acceptable levels of performance may be subject to disciplinary measures in accordance with applicable law.

In January of 2000, HHC entered into an agreement with the State University of New York ("SUNY") pursuant to which SUNY acts as HHC's agent for managing physicians employed by HHC at Kings County Hospital Center ("KCHC"). Under the affiliation agreement, SUNY is responsible for evaluating the performance of KCHC physicians. Since the start of the affiliation agreement, HHC and SUNY have been developing performance standards with which to evaluate the physicians. It is disputed whether HHC has met with representatives of the Union to discuss the proposed standards.

On October 26, 2001, Frank J. Cirillo, Senior Vice President of Operations at HHC, sent a letter to Barry Liebowitz, M.D., the Union's President, stating that, pursuant to Article VI of the agreement, HHC was giving the Union notice of new productivity standards at KCHC, taking effect January 1, 2002. The productivity standards require that each physician generate a certain number of "Visit Equivalents per Clinical FTE." The failure of any physician to achieve 85% of the applicable standard for two of any three consecutive calendar quarters would subject the physician to "disciplinary measures and shall constitute just cause for discharge."

POSITIONS OF THE PARTIES

Union's Position

The Union argues that HHC violated § 12-306a (1) and (4) of the NYCCBL when it unilaterally created new grounds for discipline by implementing productivity standards at KCHC and mandated disciplinary measures and discharge if a physician fails to meet those standards. First, in implementing the new policy, HHC created new grounds – the failure to meet certain productivity standards – for which an employee can be disciplined. The Union argues that PERB has held that "the grounds for imposition of discipline and the penalty to be imposed are likewise mandatorily bargainable." *New York City Transit Authority*, 30 PERB ¶ 3030, 3074 (1997), *aff'd*, 276 A.D.2d 702, 175 N.Y.S.2d 68 (2nd Dep't 2000).

Second, HHC, by implementing the standards and linking those standards to discipline and termination, unilaterally altered the requirements for continued employment. In *Committee of Interns and Residents*, Decision No. B-38-86, the Board held that if HHC intended to apply a New York State licensing requirement to currently employed Chief Residents, the requirement would be a mandatory subject of bargaining.

Third, because Cirillo's October 26, 2001, letter states that a physician's failure to meet the standard shall constitute just cause for discharge, HHC has unilaterally altered disciplinary procedures by precluding a physician from offering any defense to a failure to meet the standards. The Union contends that even if discipline is still subject to the existing grievance and arbitration system, new grounds for discipline and termination have been unilaterally implemented.

Alternatively, the Union contends that the standards have an immediate and *per se* practical impact on the terms and conditions of the physicians' employment, that is, whether those employees continue to be employed. Currently employed physicians will be subjected to a review

system in which their performance will be constantly measured and scrutinized to determine whether they have met the productivity standards. In addition, physicians could be discharged as a result of the new standards.

Although HHC argues that this matter should be deferred, the Union contends that the Board and PERB have held that a union must clearly invoke a specific contractual basis in order to divest the respective boards of their jurisdiction. Here, the Union does not assert a claim based on the contract. In fact, the Union argues, Article VI of the agreement does not provide a contractual basis to challenge HHC's actions. The Union cannot invoke a contractual provision that offers no basis for a grievance and no remedy. Therefore, the Board has jurisdiction over this improper practice claim.

As a remedy, the Union asks that the Board order HHC to restore the *status quo* by rescinding its unilateral imposition of the productivity standards, direct HHC and SUNY to bargain with the Union over any proposed standards, and to rescind any personnel actions made on the basis of the productivity standards.

HHC's Position

HHC argues that the subject of the Union's claim is addressed in the agreement; therefore, the Board cannot exercise jurisdiction over what is, essentially, a contractual matter. However, assuming that the Union's claim also constitutes the assertion of an independent improper practice, the Board should exercise its discretion and defer to the grievance procedure because the grievance/arbitration process may resolve both the improper practice charge and issues of contract interpretation simultaneously.

Alternatively, the petition should be dismissed because the Union has also failed to allege

facts sufficient to find an independent violation of § 12-306a(1), and has not included any specific allegations or evidence to substantiate its claims that HHC violated § 12-306a(1) and (4).

HHC argues that it is under no obligation to bargain over the non-mandatory subject of productivity standards because the establishment of such standards, unless otherwise limited, is a management right under § 12-307 of the NYCCBL.[1] HHC notes that instead of limiting its right to promulgate the standards, Article VI, § 1 of the agreement specifically reserves the right to make decisions regarding productivity standards to management.

HHC also argues that the Union's practical impact claims should be dismissed because the Union failed to pursue the claim through the proper forum, a scope of bargaining petition. Even if the Board should recognize the practical impact claim as being properly raised, there is no evidence to support a claim that the disciplinary consequences of the enforcement of the productivity standards satisfies the Board's requirements for a finding of practical impact.

The Union bases its argument on its assertion that HHC has created new grounds for discharge and that employees will not be permitted to raise any defense. HHC contends that this argument is without merit because the issue of discipline for failure to meet productivity

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[1] Section 12-307 reads in pertinent part:

> b. It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work.

standards has already been negotiated by the parties as Article VI, § 1(b) of the agreement. HHC has not amended the disciplinary procedures set forth in the agreement. If a physician fails to meet the acceptable level of performance, HHC must still file written charges against the physician and proceed through the grievance procedure, up to and including arbitration. As with any other disciplinary action, the Union is free to raise any defense it deems necessary to rebut the written charges brought against its member.

Furthermore, the Board has recognized that management has the right to bring disciplinary action against an employee who fails to comply with a management rule or decision. *District Council 37*, Decision No. B-1-90.

DISCUSSION

The first matter we will address is deferral. This Board, in accordance with § 205.5(d) of the Taylor Law (Civil Service Law, Article 14),[2] has declined to exercise jurisdiction over improper practices when the basis of the claimed statutory violation is derived from a provision of the collective bargaining agreement. *District Council 37*, Decision No. B-36-2001. Here, although Article VI, § 1 of the agreement addresses the establishment and/or the revision of performance standards, it does not provide a source of right to the Union to challenge HHC's actions in this instance, and the Union's improper practice petition does not allege that HHC has violated that

[2] Section 205.5(d) of the Taylor Law provides, in pertinent part:

> the board shall not have the authority to enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

provision. Therefore, the matter is not suitable for deferral to the grievance process.

Here, both the statutory management rights clause, § 12-307 of the NYCCBL, and Article VI, § 1(a), of the agreement authorize management to establish and revise productivity standards. While acknowledging this, the Union contests the link between HHC's productivity standards and the subject of discipline. However, the Public Employment Relations Board ("PERB"), in *County of Livingston*, 26 PERB ¶ 3074 (1993), has stated that:

> A union and an employer may satisfy by agreement their mutual duty to bargain a given subject, and thereby waive any further bargaining rights regarding the exercise of that contract right, without expressly stating in their contract that it was reached pursuant to the Act and was intended to fulfill the entirety of their statutory bargaining duty on that particular subject. *Id.* at 3143.

Where there is clear language in their contract granting the employer the right to determine unilaterally the subject matter in issue, the parties have satisfied their mutual duty to bargain. *CSEA v. Newman*, 88 A.D.2d 685, 15 PERB ¶ 7011 (3d Dep't 1982), *appeal dismissed*, 57 N.Y.2d 775, 15 PERB ¶ 7020 (1982). Such a waiver must be clear, unmistakable and without ambiguity. *Id.*

Here, Article VI, § 1(b), of the agreement states that "Employees who work at less than acceptable levels of performance may be subject to disciplinary measures in accordance with applicable law." This specific grant of the employer's right to discipline current and yet-to-be-hired physicians for failing to meet the standards is unqualified and unrestricted, and there is no evidence to suggest that the clause means something other than what it plainly states.

We reject HHC's contention that the Union's practical impact claim should be dismissed because the Union failed to initiate this claim properly through a scope of bargaining petition. In fact, the petition is labeled a "verified improper practice/scope of bargaining petition." Even if

the claim were asserted in the wrong type of proceeding, we have previously held that rather than dismissing the improper practice petition outright, we would consider it as though it were a scope of bargaining petition. *Ass't Deputy Wardens/Deputy Wardens Ass'n*, Decision No. B-16-2002. Accordingly, we will consider the Union's practical impact claim as a scope of bargaining matter.

Under § 12-307 of the NYCCBL, an employer must bargain over questions concerning the practical impact that its managerial decisions have on terms and conditions of employment. We are not persuaded that a practical impact will arise from HHC's implementation of these productivity standards. Although the Union claims that HHC has altered its disciplinary procedure and may summarily dismiss unproductive physicians, HHC asserts in verified pleadings before this Board that it has not altered its disciplinary procedures and is still obligated to bring written charges against those physicians who fail to meet the standards and then proceed through the full contractual grievance process, with the Union free to raise any defense.

Thus, the Union's sole remaining contention of a practical impact is that the implementation of the policy may eventually lead to the termination of a physicians' employment. The right to take disciplinary action is expressly reserved to management in § 12-307b of the NYCCBL, and the parties have already agreed, in Article VI, § 1(b), of the agreement, that failure to meet

performance standards will result in disciplinary action.[3] This Board stated in *District Council 37*, Decision No. B-1-90 at 16 that "It would be impractical and contrary to the policy of the

[3] We also note that the parties have already bargained over the applicable disciplinary procedures and included them in their agreement.

NYCCBL to consider every managerial decision made within the scope of its statutory prerogative as giving rise to practical impact, solely because an employee who does not conform to the decision could suffer the imposition of disciplinary action." Since it is not disputed that HHC has the right to promulgate productivity standards, it follows, therefore, that management has the inherent right to enforce those standards through the exercise of its disciplinary powers. Accordingly, the Union's petition is dismissed.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby,

ORDERED, that the improper practice petition, BCB-2250-01, filed herein, be, and the same hereby is, denied in relation to the alleged violations of § 12-306a(1) and (4) of the NYCCBL.

Dated: July 9, 2002
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

ERNEST F. HART
MEMBER

I dissent. GABRIELLE SEMEL
MEMBER